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Harold S. Lewis Jr.

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COMMENTARY

SHAFFER'S SUFFERING CLIENT, FREEDMAN'S SUFFERING LAWYER

*Harold S. Lewis, Jr.**

I came to Thomas Shaffer's and Monroe Freedman's elegant pieces about the good¹ and the suffering² client unencumbered by a research background in legal ethics. My sole qualifications to comment on these works by the paragons of the field consist of a number of years of practice and teaching and my recent passage of the Multistate Professional Responsibility Exam.³ Still, there was something so facially jarring about each essay and their aggregate residue that I felt constrained to respond. The nature and importance of the subject suggest that it ought to be approachable, at least warily, by lawyers lacking the stellar credentials of Professors Shaffer and Freedman. I do so secure in the knowledge that my incapacity will be evident to them, and I'm eager to be educated by their response.

Because each of these writers does justice to the other, we could start with either one's descriptions of both positions. Professor Shaffer posits a client whose salient characteristic is that he tends to the good. So, by the way, does Professor Shaffer's lawyer. This characteristic of both parties to the lawyer-client relationship controls Professor Shaffer's choice among three stated aspirations for the client: to be right, to be free, or to be good.

Professor Shaffer rejects the traditional American legal ethic of rectitude because he finds it "a one-way street. It speaks to professional responsibility but it tends to hubris, to regard clients as sources of corruption, as occasions of sin."⁴ This overriding of the client's own potential for goodness by the

* Professor of Law, Mercer University School of Law, A.B. 1969, Columbia College; J.D. 1972, Stanford University.

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1. Shaffer, *Legal Ethics and The Good Client*, 36 CATH. U.L. REV. 319 (1987).

2. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331 (1987).

3. For those addicted to credentialism, I exceeded the minimum passing score for the Multistate Professional Responsibility Exam set by the Georgia Board of Bar Examiners.

4. Shaffer, *supra* note 1, at 322.

lawyer's self-appointed declaration of the right is plainly inconsistent with Professor Shaffer's premises that lawyers do not enjoy a monopoly on rectitude and could profit from reciprocal advice tendered by the good client.

Professor Shaffer also rejects freedom or autonomy as an appropriate client goal, thereby parting company with both the traditional "adversary ethic" and Freedman's variation on it. He views the unvarnished adversary ethic, with its insistence that lawyers acquiesce in client demands to pursue all lawful means, as either farcical or idolatrous. Farcical, because it may lead to little more than unbridled client license and in that sense is no ethic at all; idolatrous, because any overriding principle of moral restraint such an "ethic" promotes ultimately comes from the state,⁵ and it is self-evident to Shaffer that the "state cannot, will not provide goodness."⁶ Freedman's modification of the traditional adversary model—which encourages lawyers to render ethical counsel before finally acceding to lawful client demands—stands on no sounder footing for Shaffer, since in the end it is the client who calls the ethical shots.

Shaffer is left, then, with goodness. But what started out as a selection from a menu of client goals becomes a prescription for the lawyer: "The lawyer has moral limits."⁷ If the client rejects the lawyer's moral counsel, and the lawyer feels strongly enough that the client's proposed course of action, although lawful, is morally repugnant, the lawyer has the right and the professional duty to desist. Unfortunately, out of concern for either the lawyer's or the client's own goodness, the good client is left to suffer—more particularly, to pursue his cause through counsel less scrupulous or scruple-bound. Apparently, the client's resultant suffering is, to Shaffer, the price of

5. *Id.* at 324. I am not clear what he means here. I believe he is saying that where there is client autonomy and the client insists on an immoral, although lawful, course of action, the only remaining source of goodness is the government's sense of right and wrong as expressed by legal definitions of rights and responsibilities and the procedures for enforcing them. Both Professor Freedman's and Professor Shaffer's models give promise of additional sources of the good in the persons of the client and the lawyer. (This should be true regardless of whether the discussion on the moral plane is one way, from lawyer to client, or, as Shaffer insists, takes the form of dialogue.) One can fairly question, however, whether Shaffer's twist on Freedman's approach will lead to joint decisions that tend toward the "good" any more frequently than under the Freedman model with its unilateral decisionmaking by clients. Doesn't the contrary view assume that many lawyers are a source of goodness surpassing that of their clients? Not only is such an assumption open to serious question as an empirical matter, but it is one that Shaffer himself, with his insistence that lawyers be receptive to counseling by their clients, would be among the first to reject.

6. *Id.* Professor Shaffer considers the notion that the government can deliver justice "false because goodness is not the result of fear." Shaffer, *Response to Some Problems in the Administration of Justice in a Secularized Society*, 31 MERCER L. REV. 459, 465 (1980) [hereinafter Shaffer, *Response*].

7. Shaffer, *supra* note 1, at 329.

justice. As he once wrote, "Justice involves pain and it is not adequate (not truthful) to suppose that the just man is the man who avoids the infliction of pain."⁸

Freedman, by contrast, works a reverse alchemy. His tender solicitude for the suffering client creates a suffering lawyer. As aptly described by Shaffer, Freedman's variant on the adversary ethic has two phases: "the moral counsel part, and the client-decision part."⁹ In the first part, common to both Freedman and Shaffer, the lawyer exhorts the client to forego potential advantages that might accrue from lawful or unlawful approaches that the lawyer's own ethical sense condemns. If that is successful—and Shaffer says it often will be with a lawyer of Freedman's strength of character—the problem is considered resolved. If exhortation fails, however, Freedman's client, unlike Shaffer's, has his way. In Freedman's view, the adversary system compels the conclusion that once the lawyer proposes, the client disposes. Then the will of the good lawyer must bend to that of the not-quite-so-good client. The representation must be pursued through all means that the system's laws and ethical codes permit, any moral reservations of the lawyer notwithstanding. This is what I mean by Freedman's suffering lawyer.

The facial problem with each of these views is their excessive focus on the needs of the client at a particular critical moment of the lawyer-client relationship, rather than on the contractual and social reality of the relationship as a whole. At the instant the hypothesized conflict between the good lawyer and even the good client arises, there are really only two possibilities. If the lawyer's will to be good prevails, the client gets discarded and experiences Professor Shaffer's understanding that justice involves pain. If the client's will prevails—the recommendation of Professor Freedman and, perhaps, the ABA's Model Code of Professional Responsibility¹⁰—the lawyer suffers the subjugation of her professional and moral beliefs.

Although these divergent consequences of the conflict may be unavoidable, unfair surprise to the client about possible outcomes could be mitigated substantially if a lawyer holding Shaffer's view were to disclose the moral limits of her advocacy when the relationship is formed. The pain of justice, or of Shaffer's conception of it, could then at least be anticipated. The prospective client could take the lawyer's reservations into account in deciding whether to entrust his life, liberty or fortune to a lawyer with particular disclosed scruples.

8. Shaffer, *Response*, *supra* note 6, at 463.

9. Shaffer, *supra* note 1, at 327.

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980) [hereinafter MODEL CODE]. *But see infra* text accompanying note 14.

It is far more difficult to foresee any relief for Freedman's suffering lawyer. Once the client understands that she's in the driver's seat to the virtually limitless degree Freedman finds necessary, client manipulation of the good lawyer is a very real possibility. At least one can say that Freedman's lawyer, by virtue of having accepted the representation with Freedman's strict discipline in mind, should not be surprised when she suffers the lash of a client who has resisted her moral importunings. In this sense—lack of surprise—Shaffer's client and Freedman's lawyer can be placed on an equal footing.

There are a number of obvious objections to even this modest proposal for giving clients fair warning that their advocate's qualms of conscience could leave them in the lurch. The most basic is an argument that hedging the representation with limitations based on a lawyer's scruples is contrary to the letter or spirit of the ABA's Model Code or Model Rules of Professional Conduct (Model Rules).¹¹ Scholars have sharply differed on this question under the Model Code.¹² The Model Rules, by contrast, explicitly authorize the lawyer to limit the objectives of the representation but, significantly, only "if the client consents after consultation."¹³ The Model Rules are less clear about the propriety of placing advance limitations on the means, as distinct from the ends, that the client may wish the lawyer to pursue. But even under the Code the lawyer was permitted to withdraw, except while a matter

11. See, e.g., MODEL CODE EC 7-8.

12. Compare Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 84-85 (the Model Code permits the lawyer to refuse the employment only when his "personal feelings are sufficiently intense to diminish his ability effectively to represent the client," a standard that does not clearly reach the lawyer's strictures of conscience) with Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1565 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c)(1983)) [hereinafter MODEL RULES]. The Model Code as construed permits the lawyer, when he "accepts a client, to limit on moral grounds the objectives he will pursue for her." (citing MODEL CODE EC 7-8)).

13. MODEL RULES Rule 1.2(c). The requirement that the lawyer advise the client at the outset of the relationship of the possibility of withdrawal for such reasons finds precedent in the profession's experience even before the Code. Professor Schneyer cites the example of an ABA ethics opinion that approved the withdrawal of a criminal defense lawyer after a client confided his guilt only if the lawyer had initially reserved the right to withdraw for that kind of reason. Schneyer, *supra* note 12, at 1566 n.147 (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 90 (1932)).

It is somewhat puzzling to observe the juxtaposition of MODEL RULES Rule 1.16(b)(3) with MODEL RULES Rule 1.2(c). The latter seems to authorize midstream withdrawal whenever the client insists on objectives repugnant to the lawyer, regardless of any advance warning of the kind it prescribes for objectives or limitations created when the relationship is formed. What is practicably left of the requirements of notice and consent at the outset of the relationship if the lawyer is free to pull out later without restriction? I can add little here except to express a preference for the notice and consent requirements and urge that, without them, a withdrawal for reasons of the lawyer's conscience unfairly disappoints the client's reasonable expectations.

was pending before a tribunal, if a client insisted on conduct contrary to the lawyer's "judgment and advice," and at least one scholar has no doubt that this permission included "moral judgment and advice."¹⁴ Presumably, withdrawal pursuant to limitations on lawyer conduct stipulated at the outset of the relationship presents an even easier case than withdrawal for such reasons where there has been no prior notice.

A second objection is that giving fair warning would lead to moral shopping, so that the worst clients will end up with the worst lawyers. This is a plausible concern, and a significant number of clients, warned in advance of the limits on representation dictated by the lawyer's morals, may well go elsewhere. But the objection discounts the possibility that some clients might be moved by this cautionary counsel to transcend their predispositions and to enter the formal lawyer-client relationship with greater confidence and good will. There may also be some value, even for those clients who do shop for another lawyer at a lower moral stratum, in having encountered at least one member of the profession who defies the stereotype of hired gun.

A third substantial objection is that giving fair warning could degenerate into a formalistic practice used more to let lawyers off the hook for abandoning their clients midstream than to alert clients to the potential consequences of their lawyers' ethical sensitivities. One can imagine, for example, the lawyer who might elevate a desire to spend more time with his family into a moral dictate that demands his dropping a particular unremunerative case. I would expect bar authorities to see through this attempt to use the *a priori* disclaimer as a smoke-screen; after all, the Model Rules' permission to limit the objectives of representation in advance refers to "objectives . . . the lawyer regards as repugnant or imprudent,"¹⁵ not merely unwelcome. In any case, it seems intuitively unlikely that many such lawyers would advertise the moral escape route to their clients in the first place. The warning would more commonly be given by those lawyers who take seriously their obligations to give (or, as Shaffer would add, receive) moral as well as legal counsel. To the related objection that some lawyers will use the boilerplate moral disclaimer to avoid thinking about their clients' suffering, I can only concede that any device can be corrupted by improper motivation.

In brief, it would be an unnecessary loss if either the Freedman or the Shaffer model were viewed as exclusive. Each has obvious virtue: Professor Freedman's unswerving devotion to vindicating the client's legal rights, Professor Shaffer's tireless search for the good in a lawyer-client dialogue. Each

14. Schneyer, *supra* note 12, at 1565 (citing MODEL CODE EC 7-8); see also MODEL CODE DR 2-110(C)(1)(e).

15. MODEL RULES Rule 1.2(c) comment.

model serves the distinct needs of different clients, or perhaps the varied needs of every client. In the abstract, then, in order to offer potential clients a choice, we should want both models to survive, provided that neither unduly damages what the profession would regard as a core professional value. At least theoretically, Professor Shaffer's model carries that dangerous potential, since his client may be unfairly surprised when his cause is jettisoned after he and his lawyer reach moral deadlock. The suggestion made here could ameliorate that harm by warning of the possibility and permitting the client to decide whether to accept the risk. As Professor Freedman offers an attractive alternative to the raw adversary ethic, Professor Shaffer's model, so modified, offers a fair and important¹⁶ alternative to Professor Freedman's.

16. As suggested earlier, *see supra* note 5, it is doubtful whether the outcomes of mutual counseling under the Shaffer approach will be more directed to the good than those reached under the approach advocated by Professor Freedman. Nevertheless, the availability of Professor Shaffer's alternative may be important for the distinct reason that it offers a choice for those clients who want to engage in his two-way process. Indeed, some clients may be attracted to that process precisely because on some level, perhaps the subconscious, they seek a moral "turning" and believe they are more likely to achieve it if their lawyer holds the ultimate trump card on a matter of practical affairs.